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FILED

JAN 22 2013

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Antonio Sells # 448149 }
Petitioner, }
}
}
V. } Case No 12-CV-471-CVE-PJC
}
Anita Trammell, Warden }
Mack Alford Correctional Center }
Respondent. }

PETITIONERS RESPONSE BRIEF

Number listed in parenthesis refer to page citation from the original record in this appeal (O.R.), preliminary hearing (P.R.) and the transcript from the jury trial held in this case on May 2 – 4, 2011 (Tr., TR II, TR III).

REPLY AS TO GROUND 1

Respondent brief misstates a crucial fact about the eyewitness-tainted identification of Petitioner.

In this case, Petitioner Sells contends that they eye witness, Ms. Bible, identification of Petitioner was completely tainted based on an overly suggestive, one man show up. And her identification violated my due process rights and a fair trial. The respondent brief is very misleading as it inaccurately states that Ms. Bible was not told by Officer Abbey that he had suspect number two in custody. Ms. Bible's testimony at preliminary and trial contains repeated statements that officer Abbey in fact did tell her that they had suspect two in custody when he pulled up to the scene with a black male

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handcuffed in the back seat of a patrol car. Throughout the entire case, Ms. Bible states that Officer Abbey informed here that suspect 2 was in custody. The following are direct quotes from Ms. Bibles preliminary and trial testimony:

(P.H. TR, page 11, line 1 – 13)

(Defense trial Lawyer) This is a little bit so I – I have it straight. The police pull up. Now, they tell you - - what is it that they tell you to have to come over to the car?

(Ms. Bible) The arresting officer ask, was questioning me, asking me questions as far as what actually I saw, what had happened. They stated that they did arrest one of the males that was included in the attempt, and they actually had brought him in front of the store where I was standing.

(TR.II, page 148, line 21-24)

(Prosecution) Okay. You've told this jury that the police officer told you that they had apprehended someone that was involved in the robbery?

(Ms. Bible) Yes.

(TR. II, page 165, line 20-21)

(Defense Counsel) Did he tell you that he had suspect No. 2 in the car.

(Ms. Bible) Yes, sir.

(TR. II, page 166, line 21-24)

(Defense Counsel) Okay. And understandable. So the first officer told you that they had a couple of suspects and then the second officer comes in and he tells you he has suspect no. 2 in the car; is that right?

(Ms. Bible) Correct.

(TR II, page 168, line 16-18)

(Defense Counsel) And the officer told you that suspect No. 2 was in the car; correct?

(Ms. Bible) Correct.

(TR II, page 168-170)

(Defense Counsel) would it be fair to say that at the point in time that you told the police that Mr. Sells was over here was suspect no. 2 was after they told you that they had someone under arrest and, in fact, told you that suspect no. 2 was in the car?

(Ms. Bible). Yes, Sir.

As you can see Ms. Bible told the courts not once, not twice, not three times, but sever different times that Officer Abbey in fact told her that he had suspect no. 2 in custody. Even during trial Ms. Bible went on to explain that she had no reason to doubt the police when they told her he had suspect no. 2 in custody. Therefore, the police telling her that did influence Ms. Bibles identification and tainted her identification of Petitioner Sells.

Not only was the show-up a violation of my rights to due process and a fair trail, it also violates and denied me my Sixth Amendment right. Its stated in Gilbert v. California that: Post indictment pretrial lineup at which defendant was exhibited to identifying witness was critical state of criminal prosecution at which defendant was entitled to counsel, and conduct of line up without notice to and in absence of counsel denied defendant his Sixth Amendment Rights.

At my trial officer Abbey testified to his version of how Ms. Bible identified the Petitioner. If you follow officer Abbey testimony you will see how Ms. Bible identified Petitioner. If you follow officer Abbey testimony you will see how his testimony will change. At preliminary he stated that she was standing there saying "that's him, that's him." He stayed with that story even though Ms. Bible said he came up to her and told her he had suspect no. 2 in the car. Then at the motion to suppress hearing he stated that as he was getting out of the car the victim and an independent witness were both pointing in the rear drivers side door saying that was him (Motion to Suppress hearing, page 9, In 1-7). Then at trial he was asked again about this other witness and he said he didn't know who the other guy was and no information was taken from this guy. Officer Abbey was told to be on the look out for a black male with a white shirt. He stated in Preliminary that he saw a black male with a white shirt going over the privacy fence but when he got around to where Petitioner was being held he had on a gray shirt and not a white shirt.

In order to determine that the identification is independently unreliable, the Supreme Court uses the five factors: (1) prior opportunity of the witness ot observe the defendant during the alleged criminal act; (2) degree of attention of the witness; (3) accuracy of the witness prior identification; (4) the witness level of certainty; and (5) the time between the crime and the confrontation.

For the first factor, Ms. Bible opportunity to see Petitioner was very limited. The entire incident lasted no longer than 30 seconds. Both suspects had on ski masks that covered their face, so she never got to see either one of the suspects face. Ms. Bible stated that most of her attention was on the smaller suspect because he had the gun on her rather than the second man (Tr. II 141, 155). She even testified that she probably only looked at the second male for three to five seconds, and noted that she could not even see his face (Tr. II 158). Ms. Bible gave a detailed description of the suspect and his clothing. She stated he was heavyset, African American and wore a white t-shirt and blue jeans and ski-mask (O.R. pg 25). The only thing that the Petitioners and the suspect had in common was that they were both large black males. The description that Ms. Bible gave the police did not match what Petitioner Sells had on.

Focusing on the Second factor, which is the degree of attention of the eyewitness. Ms. Bible said her attention was focused on the gun then on the smaller suspect pointing the gun. Only a little attention was focused on the second man who just stood there (TR II, 154-155). Under factor two, you can see once again it holds true that the degree of attention from Ms. Bible on the second man was very limited.

The third factor concerns the accuracy of prior identifications. As I pointed out before the only thing that Petitioner and the second man has in common is that their both black males. Ms. Bible's clothing identification of the second man does not match what Petitioner Sells was wearing when he was wrongfully arrested by the police. Ms. Bible said the larger male was wearing a white t-shirt and blue jeans. (O.R. pg 25). She even testified at Preliminary that the second male had on a regular white, like hanes t-shirt, lighter blue jeans (P.H. TR pg 9, pg 26, pg 34). She even testified there was no doubt in her mind that the larger one was wearing a white t-shirt during the incident (TR. II, 141, 154, 157-158). The physical evidence itself proves that Ms. Bible was 100% wrong in her clothing description. Petitioner Sells was arrested wearing a gray shirt and gray sweat pants (Tr. II, 237). Under the third factor, Ms. Bible's identification of Petitioner was 100% wrong and not accurate at all.

Further uncertainty was created when co-defendant testified. Evans testimony was unbelievable and contradicted all other witness testimony. Evans testified that Petitioner had a gun. Ms. Bible said only the small suspect had a gun. He also said Petitioner was wearing a colored shirt with a white shirt underneath (Tr. II 275 – 2775). Its impossible for any of these statements to be true. Petitioner was arrested wearing only one shirt and it was gray, not white. If Petitioner Sells was wearing a white undershirt, then he would have been arrested wearing a white undershirt not gray, or he would have had a white shirt on under his gray one. For the co-defendant to say Sells was changing clothes as he ran from the scene, no white shirt was every found anywhere in the area, no second ski mask was found or a second gun ever located in the area (Tr. II 237, 244, 245, 256 – 257, 305). The physical evidence proves that Petitioner Sells was not a participant in this attempted robbery with co-defendant Evans.

The fourth factor for the court to consider is the witness level of certainty. The state did not really address Ms. Bible's level of certainty as to the identification of Petitioner. Ms. Bible's claim she was certain about the identification but if we go back to the preliminary hearing you can tell by her testimony that she was not in her right state of mind during the robbery. If we go back to Ms. Bible's testimony at preliminary you will be able to tell that Bible was in a State of Shock and delusion. She stated that when she saw Petitioner Sells in the back of the police car he was wearing a white t-shirt and light blue jeans (P.H. Pg. 28, ln 10-11). As it was established that Mr. Sells was wearing a gray shirt and gray sweats when he was arrested. Another witness told Ms. Bible she was screaming, but she stated she didn't remember screaming. (P.H. pg 22, ln 20-24). So you can tell from her testimony that Ms. Bible level of certainty is not trustworthy. She was just in a robbery, had a gun pointed towards her face and only thing that was on her mind was her kids. She was delusional and not in her right state of mind.

This case has all the ingredients of a mistaken identification. The eyewitness identification by Ms. Bible was tainted and unreliable. Due process required suppression of her testimony. There is no physical evidence that can prove with certainty that Petitioner Sells committed the attempted robbery for which he has been convicted. And neither is there any physical evidence whatsoever to connect Petitioner to the scene of the crime. The only "evidence" that he State had to connect Petitioenr Sells to this crime was Ms. Bible's inaccurate clothing description and unreliable identification based on an overly suggestive one man show up by the Officer and the testimony of a co-defendant with very little credibility.

It is clear that Bible's accuracy of the description of the larger man in this robbery is questionable and lacking reliability in this case. In order to sustain a conviction, the evidence must show that the offense was committed but also must inculpate the defendant with certainty. See Cude v.State, 42 Okl.Cr. 357, 276 P. 240, a mere suspicion of guilt is not enough. See Fields v. State, 1983 Okl.Cr. 106, 666 P.2d 1301. Without Ms. Bible's tainted eyewitness identification the State only established a suspicion of Petitioner Sells guilt. If Petitioner Sells wasn't never illegally detained by

Officer Abbey we never would have had a tainted overly suggestive one man show. The evidence presented at Petitioner Sells trial was insufficient to convict him of attempted robbery. Petitioners guilt was not proven beyond a reasonable doubt as is required under the law. In the interest of justice, this verdict should be reversed with an order to the trail court to dismiss this charge against Petitioner Sells.

REPLY TO GROUND 2

The OCCA's and Respondent opinion that the evidence sufficient to support Petitioners claim.

Petitioner Sells was charged with attempted robbery with a firearm. In order to convict Petitioner of the offense, the State has to prove beyond a reasonable doubt the eight elements of attempted robbery. The State failed to proved the facts needed to sustain a conviction based on the required elements of attempted robbery. As it was discussed in Ground 1, Ms. Bible's identification was the key issue in this case. Based on the facts I stated in Ground 1, the overly suggestive one man line up/show up, the inaccurate clothing description of Petitioners clothing given by Ms. Bible, her identification does not prove Petitioner was one of the men involved in the incident beyond a reasonable doubt that is required by law.

The only other key piece of evidence that the State had against Petitioner Sells was the testimony of co-defendant Keonte Evens. Evans testimony contradicted the physical evidence concerning Petitioner's clothing. (Defendant's exhibit 2, TR. II 275 – 277). Evans testimony about Petitioner Sells having a gun conflicted with Ms. Bible testimony and the fact that police only found one gun, Evans gun, when they did a search of the area (P.H. Tr. 9, 21, TR. II 141, 154, 162, 257, 266, 273, 276-278, 283, 309). Ms. Bible testimony stated that the smaller man in the black hoodie was the one that did all the talking, he was the only one that grabbed her hair and tried to cover her mouth (P.H. T. 9 – 10, TR II, 141-142, 145, 154-155). Completely contradicting Ms. Bible's testimony you can see that Evans is trying to get the blame off him and blame Petitioner Sells.

As for Mr. Knight's testimony, if we go back to the original records and trial records we will see that Knight version of what happened is different from what Evans said and what Sidney Swank said. At one point, Knight said he saw them run past his window while he was watching T.V. and when he went outside he couldn't see anybody so he went back inside (TR II page 179, ln 8- 11). Then he came back and said two of them went running in front of his window changing shirts, pulling shirts over, doin something (TR II, page 184, ln 23-25). Its two things to consider before taking his testimony accountable. It was his wife Rhonda that saw them run past the window, not him (Tr. II page 197, ln 21 –24). Mr. Knight said that when the suspects ran pass the window they were changing shirts. Well, if we go back its stated that no white shirt was found in the area of the check cashing place or the apartment complex. If we go a little further into Knight's testimony, he said he didn't get a good look at the two suspects when they ran past the window; he didn't get a facial look at them (Tr. II pg 203, ln 17-19). At one point during Knights testimony he stated that the larger suspect had on some kind of jersey, either blue or beige with a number on it (TR II pg 187, ln 15-17). It's clear that Mr. Knight is either A. Offering information just to be helpful or B. He saw a totally different suspect and confused Petitioner Sells for him. Because nowhere in any of the records does it say anything about anybody wearing any type of Jersey and

Petitioner Sells clothing he was arrested in is not even close to what Mr. Knight described. So, if we look at Knights testimony as a hold we'll see that when the suspects ran past the window he didn't see their face (Tr. II pag 203, Ln 17 – 19). Then when he stepped outside he stated he didn't see anybody (Tr. II page 198, ln 21-25). The clothing description he gave out was of a blue or beige jersey (TR II pg 187, Ln 15-17). Mr. Knight's testimony didn't support any facts that were given by any of the other witnesses.

As for Mr. Swink's testimony, his testimony does not in any way corroborate the co-defendants testimony. Mr. Swink testified that he only seen the small suspect in the black hoodie knelling behind the building (Tr. II pg 213, ln 1-7). And when he was at the apartment complex, he only seen the suspect in the black hoodie (TR II, pg 214, ln 22-24). No where in his testimony or original police report does he say anything about a large suspect.

None of the evidence corroborated the co-defendants testimony. The jury did not have sufficient evidence to find beyond a reasonable doubt that the testimony of the accomplice was corroborated by the material facts. If the jury would have really considered all of the evidence presented they would have see that nobody's story went together. Ms. Bible's and Officer Abbey had conflicting stories. Ms. Bible and co-defendant Evans had conflicting stories. Mr. Knight testimony does not describe any of the suspects. And it's clear that Keontae Evans only testified to help himself. He appeared at two separate trial dates and left without letting anybody know. It even got to the point where the District Attorney was ready to have him arrested for leaving, or in her words bailing on her (O.R. pg 111). It's clear that the D.A. got Evans to testify for her. He didn't do it cause he wanted to, he did it because she, the D.A. wanted him to. They were even going to revoke his probation because he wouldn't show up to testify (O.R. pg 111). When Evans took a deal he pled no contest and no where on his plea deal did he mention Petitioner Sells name or anything about anyone being with him.

CONCLUSION

For all the above reasons and authorities cited, Petitioner respectfully requests this court reverse his conviction for attempted robbery with a firearm with instructions to dismiss his case. In the alternative, Petitioner Sells ask that he be granted a new trial.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I, Antonio Sells, do hereby certify that on this 16 day of January 2013, I sent a copy of this Petitioners Response Brief to:

Attorney General
Counsel for Respondent, State of Oklahoma
313 NE 21
Oklahoma City, OK. 73105

Antonio Sells

Antonio Sells # 448149

CERTIFICATE OF MAILING

I, Antonio Sells, certify that on this day I caused the forgoing document, Petitioners response brief, to be mailed to the following, via first class U.S. Mail, postage prepaid, by delivering the same to the prison's legal mail services:

Court	Opposing Party
Office of the Clerk	Office of Attorney General
U.S. District Court	State of Oklahoma
Northern District of Oklahoma	313 N.E 21
Tulsa, OK 74103	Oklahoma City, OK
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On this the 16 day of January, 2013.

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